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No. 05-1110

Supreme Court, U.S.
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In The

Supreme Court of the United States

RADA BIDOAE,

Petitioner,

v.

HARTFORD GOLF CLUB ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Appellate Court Of Connecticut

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

The Petitioner in this matter was asserting that she was at permanent total disability status and therefore unable to return to work. In order to establish this claim the Petitioner underwent a Vocational Examination with her own vocational expert. Arguably, it was her expert's opinion that the claimant may be totally disabled from gainful employment. The Respondents wanted to have the claimant submit to their own Vocational Examination with an expert of their choosing in an attempt to defend the claim, but the Petitioner refused. This issue went to a Formal Hearing in front of a Trial Commissioner on May 8, 2001, and the Commissioner issued an Order dated July 24, 2001 ordering the Petitioner to undergo a Respondents' Vocational Examination. The Commissioner further ordered that if the claimant refused to undergo said examination, then the claimant was precluded from entering her vocational expert's report into evidence. The Petitioner appealed this Order to the Compensation Review Board and in a decision dated June 27, 2002, the Compensation Review Board affirmed the Trial Commisioner's Order. *Bidoae v. Hartford Golf Club*, 4424 CRB-6-01-8 (June 27, 2002).

The Petitioner then appealed to the Appellate Court of the State of Connecticut. The Appellate Court utilized both Connecticut and Federal Statutes to affirm the Trial Commissioner and the Compensation Review Board. *Bidoae v. Hartford Golf Club*, 91 Conn. App. 470 (2005). The Petitioner then requested certiorari to the Connecticut Supreme Court. *Bidoae v. Hartford Golf Club*, 276 Conn. 921 (2005). Certiorari was denied by the Connecticut

Supreme Court, thus leading to the Petitioner's current appeal to the United States Supreme Court.

REASONS FOR DENYING THE PETITION

The decision of the Connecticut Appellate Court does not conflict with any federal statutes, nor does it decide an important question of federal law in conflict with the United States Supreme Court. In addition, in her petition for writ of certiorari to the United States Supreme Court, the petitioner asserts incorrect statements of both fact and of law on a number of occasions. Certiorari has already been denied by the Connecticut Supreme Court, and for these reasons, the Respondents believe that Certiorari should be denied by the United States Supreme Court. The arguments set forth hereafter in support of this assertion are organized to mirror the outline established in the Petitioner's Petition for Writ of Certiorari.

I. THE DECISION OF THE CONNECTICUT APPELLATE COURT WAS A CORRECT INTERPRETATION OF BOTH CONNECTICUT AND FEDERAL LAW, AND CLEARLY DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

This section of the petitioner's brief clearly misstates the ruling of the Connecticut Appellate Court. The petitioner provides, as relevant:

> In the case at bar, the Connecticut Appellate Court held that a Workers' Compensation Commissioner can order a claimant to undergo an examination, physical or mental, by a non-physician

> in exercise of his equitable powers and that these equitable powers usurp the statutes enacted by the legislature governing these examinations.

This was not the holding of the Connecticut Appellate Court. Rather, what the Appellate Court did find was that in this case, in order to establish her inability to sustain gainful employment, the plaintiff retained a non-physician vocational rehabilitation expert who was prepared to testify that, "examination and testing established the plaintiff's present lack of capacity to perform in the workplace." The Appellate Court found that the plaintiff, "thereby overtly made vocational rehabilitation assessment procedures material and necessary for the defendants for the purpose of rebuttal." *Bidoae v. Hartford Golf Club*, 91 Conn. App. 470, 478 (2005). Thus, the Appellate Court properly held that the opportunity to present a competing assessment of the plaintiff's vocational abilities by a similarly qualified expert was imperative in order to ensure that both sides received a fair trial. Therefore, the Appellate Court affirmed the Trial Commissioner's holding, and determined that the need for discovery outweighed the burden on the plaintiff, and, therefore, compelled discovery. There was no holding, as asserted by the Petitioner, that a Commissioner can order, "an examination, *physical or mental*, by a non-physician." (emphasis added).

The Petitioner, in her brief in Section I of the Reasons for Granting the Writ, further stated regarding the Appellate Court's decision:

> The Connecticut Appellate Court further held that due process of the Untied (sic) States Constitution and the Connecticut Constitution does not include a right to privacy in relation

with examinations of parties to a litigation and that if it did exist that the Workers Compensation Commissions equitable powers usurp this Constitutional right.

This is a blatant misstatement of the Connecticut Appellate Court's decision in this case. Simple reading of the plain language of the decision makes this abundantly clear. The Petitioner clearly must not be allowed to devise a fictional holding of the Appellate Court so as to create a federal question to be reviewed by the United States Supreme Court.

A. THE APPELLATE COURT DID NOT VIOLATE THE SEPARATION OF POWERS CLAUSE, AND DID NOT ORDER A MEDICAL EXAMINATION BY A NON-PHYSICIAN

The Petitioner in Section IA of her argument asserted that the Connecticut Appellate Court, in its decision, compelled a claimant to undergo a physical examination by a non-physician, therefore, "transcending specifically delineated powers instead of enforcing them." Further, the Petitioner argued that, "The Appellate Court modified and changed the Statute and legislatures (sic) directive to include examinations by a non-physician whether requested by the employer or ordered by the commissioner."

This argument is void of merit. It lacks a correct factual basis, and is an inaccurate application of both Connecticut and Federal statutes. First and foremost, the Respondents have *never* asked that the claimant be required to submit herself to a "physical" examination by a vocational rehabilitation specialist. Secondarily, but of no less importance, the Appellate Court decision does not

hold that the claimant must submit herself to a "physical" examination by a vocational rehabilitation specialist retained by the respondents.

What the Respondents requested, and what the Appellate Court affirmed, was the necessity for the claimant, under the facts of this case, to submit herself to a "vocational" assessment by a vocational rehabilitation specialist. There is no "physical" component to such an assessment, as a vocational rehabilitation specialist never physically examines a client. Instead, a vocational rehabilitation specialist reviews a client's medical records, conducts an oral interview of a client, and administers vocational testing designed to assist in developing a client's vocational profile. Such testing may include an IQ test, and any other of a number of general standardized, written, and oral vocational tests such as the Test of Non-Verbal Intelligence-3 (TONI-3), Wide Range Achievement Test-3 (WRAT-3), General Clerical Test (GCT), Wechsler Memory Scale-III (WMS-III), and the Wechsler Adult Intelligence Test-III (WAIS-III). A vocational expert's assessment also takes into account a client's work history and transferable job skills, and may additionally address a labor market survey in order to determine job availability in a particular geographic area. None of this, involves the "physical" examination of a client by a "non-physician" vocational expert.

The Respondents have not asked for such a physical invasion of the sanctity of the claimant's body; the Trial Commissioner and the Compensation Review Board did not grant the appellees the right to any such invasion; and, the Appellate Court did not affirm any such invasion. A vocational examination is not a "physical" examination,

as asserted by the appellant, and her claims to the contrary are misguided. The Appellate Court's decision, therefore, clearly does not violate the claimant's right to privacy as alleged by the Petitioner. The Petitioner has opened the door to the issue of whether she is vocationally unemployable, and the Respondents must be given the opportunity to rebut that assertion.

Furthermore, the Petitioner asserts that, "The Appellate Court by upholding this ruling surpassed its power to review, acted outside of its powers to review and interpret law, delved into the powers and stepped into the shoes of the legislative branch." This argument is flawed and can be easily disposed. The Appellate Court at no time ordered a physical examination. The Appellate Court merely affirmed the ruling of the Compensation Review Board, which determined that the Petitioner should not be afforded the opportunity, on one hand, to present her evidence and witnesses, yet, on the other hand, refuse to cooperate with the Respondents, thus obstructing their own opportunity to do the same. The Petitioner subjected herself to a vocational assessment by a specialist of her choosing. The Respondents were simply looking for the same opportunity. To deny this opportunity for the Respondents to meaningfully develop their case would be contrary to due process.

Furthermore, in this matter, the Appellate Court did not create legislation or usurp the powers of the Legislative Branch. The Connecticut Appellate Court merely reviewed the holding of the Trial Commissioner and the Compensation Review Board, and determined that it was decided in a correct manner at the lower administrative and trial levels.

B. THE APPELLATE COURT DID NOT VIOLATE THE SEPARATION OF POWERS BY EXCLUDING TESTIMONY

In the Petitioner's argument she cites to Connecticut General Statutes Section 31-294f which states, as relevant:

> An injured employee shall submit himself to examination by a reputable practicing physician or surgeon, at any time while claiming or receiving compensation, upon the request of the employer or at the direction of the commissioner .... The refusal of an injured employee to submit himself to a reasonable examination under this section shall suspend his right to compensation during such refusal.

Again, the Respondents reiterate, that the examination which was sought was not a medical examination. Rather, it was a vocational assessment. Therefore, this section is not applicable.

This issue was solely an evidentiary matter, and, pursuant to the Workers' Compensation Act of the State of Connecticut, is therefore left to the ultimate discretion of the Trial Commissioner. Thus, the Appellate Court correctly applied the guidelines established in Connecticut General Statutes Section 31-298, which provides in relevant part:

> The commissioner shall proceed, so far as possible, in accordance with the rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to

> ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter . . .

Furthermore, as stated by the Appellate Court on page 479 of their decision, "the commissioner has broader discretion over evidence than does a trial court." [See *Bidoae v. Hartford Golf Club*, 91 Conn. App. 470, 479 (2005)] Thus, when making their ruling, the Appellate Court relied upon the Connecticut Workers' Compensation Act, and subsequently determined, "that the commissioner did not abuse his discretion in precluding the plaintiff from admitting evidence from her vocational rehabilitation expert when she disregarded the commissioner's order to submit to an examination by the defendants' expert." *Id.*

Again, this argument of the Petioner does not raise a legitimate federal question. The Connecticut Appellate Court was not legislating, nor was it changing the Workers' Compensation Act in any manner. Rather, it was utilizing the Act and its mandates when reviewing and affirming the decision of the Trial Commissioner.

C. THE APPELLANT'S FOURTEENTH AMENDMENT RIGHTS WERE NOT VIOLATED BY THE RULING OF THE CONNECTICUT APPELLATE COURT

As to the Appellate Court's affirmation of the Trial Commissioner's order that the petitioner needed to either submit to the respondents' vocational examination or be barred from submitting her own vocational expert report, that determination was based upon the respondents' basic fundamental rights of "due process." The rationale for same is laid out in a clear and succinct fashion by the

Appellate Court at pages 477 to 478 of the decision. [See *Bidoae v. Hartford Golf Club*, 91 Conn. App. 470 (2005)]. The Appellate Court affirmed the Trial Commissioner's finding that, "the need for the discovery [the vocational evaluation] outweighed the burden on the protesting party. . . . " *Id.*, p. 478. On this issue, the petitioner's arguments are akin to a plaintiff in a product liability case who has exclusive control over the claimed defective product, who seeks to submit into evidence an expert opinion on the alleged defective nature of the product, while seeking to bar the defendants from having their own expert examine the product. Where is the due process in such an argument? It does not exist.

The Petitioner, in this section of her Petition for Writ of Certiorari, relies upon flawed legal arguments, as well as misstatements of fact, in order to develop her due process argument. First, the Petitioner asserted that the, "Appellate Court legislated from the bench in ruling that a medical examination, physical or mental, can be ordered by the Workers' Compensation Commission in direct violation of Statute." She continued on to state:

> By the Appellate Court failing to implement and follow the statutory guidelines for this type of examination, applying sanctions outside of the legislative directive, punishing the Petitioner for objecting to a physical/mental examination by a non-physician as defined by statute and denying the petitioner the right to a fair hearing violated (sic) the Petitioners Due Process Rights.

This assertion is a repetitive and incorrect argument. Again, the Appellate Court did not legislate from the bench, they affirmed the Trial Commissioner's and the Compensation Review Board's utilization of relevant

portions of both Connecticut state law and Federal law. Furthermore, the Appellate Court did not create or apply sanctions outside the realm of the Workers' Compensation Act of the State of Connecticut, nor was a physical examination by a non-physician ordered. Again, these are repetitive and flawed arguments that misstate the Appellate Court's decision in this matter, and skew the facts in a manner that would favor the Petitioner.

The Petitioner also argues, "The employer in the matter at hand had every legal right to request and have ordered an examination by a qualified physician/surgeon to contest the Petitioners evidence but chose not to do so." This is a misstatement of fact. The Petitioner had an examination conducted by a vocational rehabilitation specialist. This examination was not a medical or physical examination. As a result of this meeting with the Rehabilitation specialist, the Petitioner was prepared to have this individual testify that she was not capable of employment from a vocational, not medical standpoint. The Respondents merely sought to present equal evidence from their own vocational rehabilitation specialist. At no time did the Respondents seek a physical examination. The Petitioner's assertion that the Respondents could have obtained such an assessment flies in the face of reason. Physicians are *not* vocational experts.

II. THE DIFFERENT STANDARDS ESTABLISHED BY THE SOCIAL SECURITY ADMINISTRATION AND THE WORKERS' COMPENSATION ACT OF THE STATE OF CONNECTICUT DO NOT CONFLICT NOR DO THEY HAVE A DETERMINATIVE EFFECT ON ONE ANOTHER

The final issue raised by the appellant in her Petition is a claim that the Social Security Determination should

have bearing on the Workers' Compensation Commission's finding of no total disability. Again, the Appellate Court, quite clearly and concisely, addressed this concern at pp. 480-481 of their decision. The standards for Social Security Disability are different than the standards for Connecticut Workers' Compensation, and the Respondents were not parties to the Social Security Disability action. *Bidoae v. Hartford Golf Club*, 91 Conn. App. 470, 480-481 (2005). As such, the Petioner's claims for collateral estoppel or issue preclusion on this issue are misguided and should be given no further attention. Furthermore, this issue was not previously raised by the Petitioner at the time of trial and therefore has not been appropriately preserved for appeal.

CONCLUSION

For all the foregoing reasons, the Respondents respectfully request that the Petitioner's Petition for Certiorari be denied.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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I. THE DECISION OF THE CONNECTICUT APPELLATE COURT WAS AN INCORRECT INTERPRETATION OF BOTH CONNECTICUT AND FEDERAL LAW, AND VIOLATES THE UNITED STATES CONSTITUTION

The Respondent in this matter has brought into issue the holdings in the Appellate Court. In specific, the Respondent has stated that the petitioner has blatantly misstated the Appellate Courts decision on several occasions.

The Appellate Court in its decision stated;

> When the defendants attempted to compel the plaintiff to submit to an evaluation with their vocational rehabilitation expert, she refused, arguing that the independent medical examination with a nonphysician vocational rehabilitation specialist would be an invasion of her personal privacy as defined by General Statutes §52-178a. She contends that because a nonphysician vocational rehabilitation specialist does not practice a healing art under General Statutes §20-1 the commissioner cannot order such an examination. She argues that the commissioner cannot transcend its statutorily defined jurisdictional boundaries; see *Dowling v. Slotnik*, 224 Conn. 781, 800, 712 A.2d 396 cert. Denied sum nom. *Sotnic v. Consindine*, 525 U.S. 1017, 119 S. Ct. 542, 142 L.Ed.2d 451 (1998); and absent specific authorization by the Workers Compensation Act; General Statutes §31-275 et seq.; a commissioner cannot order a plaintiff to submit to an examination by a nonphysician such as a vocational rehabilitation specialist. We disagree.

The court then goes on to reason in support of its disagreement that;

"Although the plain language of §31-294f authorizes physical or mental examinations by a reputable practicing physician or surgeon, and the defendants' vocational rehabilitation expert is not medical doctor, §31-294f does not limit the equitable powers of the commissioner."

The court further in support of its disagreement that;

> General Statutes §31-178 provides in relevant part that the commissioner shall. . . have the power to summon and examine under oath such witnesses, and may direct the production of, and examine or cause to be produced or examined, such books, records, vouchers, memoranda, documents, letters, contracts or other papers in relation to any matter at issue as he may find proper, and shall have the same powers in reference thereto as are vested in magistrates taking depositions and shall have the power to order depositions pursuant to section 52-148. He shall have power to certify to official acts and shall have all powers necessary to enable him to perform the duties imposed upon him by the provision of this chapter. . . .

The court also in support of this disagreement stated that;

> The commissioner's abilities are further expanded by General Statutes 31-298, which provides in relevant part that the commissioner shall proceed, so far as possible, in accordance with the

> rules of equity. He shall not be bound by the ordinary common law or statutory rules of evidence or procedure, but shall make inquiry, through oral testimony, deposition testimony or written and printed records, in a manner that is best calculated to ascertain the substantial rights of the parties and carry out the provisions and intent of this chapter. . .

The court thereafter went into a short due process discussion, which was discussed in the Petitioner's original petition, and ultimately concluded that;

"Thus, the specific directive concerning the procedure for obtaining mental or physical examination by physicians contained in §31-294f does not detract from a commissioner's authority to act pursuant to the more general provisions that may render such information discoverable."

The Petitioner's statement as to the Courts Holding was not and is not a blatant misstatement of the Appellate Courts Rulings. The Appellate Court has used the legislatures grant of powers, the powers of equity to conduct hearings and the powers of equity regarding the rules of evidence, to supercede the Connecticut Legislatures statutory directives regarding Examinations and/or to create new law governing these types of examinations.

A. THE APPELLATE COURT VIOLATED THE SEPARATION OF POWERS CLAUSE AND DID ORDER A MEDICAL EXAMINATION BY A NON-PHYSICIAN

1. AN EXAMINATION BY A VOCATIONAL REHABILITATION SPECIALIST IS A PHYSICAL AND/OR MENTAL EXAMINATION

The respondents argue that the Workers Compensation Commission did not order an Medical Examination by a non-physician which the Appellate Court further upheld. The Respondents argument is superfluous and should not be an overriding issue to defeat the Claimants Petition. A vocational rehabilitation specialist evaluates a persons physical and mental condition to determine a persons employability. Courts, State and Federal alike, have determined that any order from any court for an examination by a Vocational Rehabilitation Specialist is in fact a physical and/or mental examination. See *Acosta v. Tenneco Oil Co.*, 913 F.2d 205 (5th Cir. 1990); *In re Mitchell,(*563 F.2d 143 5th Cir.1977); *Landry v. Green Bay & Western Railroad Co.*, 121 F.R.D. 400 (E.D. Wis. 1988); *Soudelier v. Tug Nan Services, Inc.*, 116 F.R.D. 429 (E.D.La. 1987); *Acocella v. Montauk Oil Transportation Corp.*, 614 F. Supp. 1437 (S.D.N.Y. 1985). See also *Williams v. Smith*, 576 So.2d 448 (1991); *State ex rel., Kerns v. Cain*, 8 S.W. 3d 212 (1999); *Avila v. Superior Court, In and For County of Maricopa 816* P.2d 946 (1991) and most recently in Connecticut see *Gladney v. Riccio* 2006 WL 574256 (Conn. Super. 2006).

2. ALLOWANCE OF AN EXAMINATION BY A NON-PHYSICIAN VIOLATES THE PETITIONER'S RIGHT TO PRIVACY

The United States Supreme Court has held that a court cannot order examinations of parties absent Statutory Authority. *Union Pacific Ry. Co. v. Botsford*, 114 U.S. 250 (1891). The reasoning behind the rule that Statutory Authority must be present for examinations of parties is that it is the duty of the Legislature "to restrict the circumstances under which a party may be required to submit his mind or body for examination, thus balancing considerations of the sanctity of the body and the right to privacy with considerations of fairness in the judicial quest for truth." *Williams v. Smith* supra.

The Connecticut Legislature by enacting Connecticut General Statutes §31-294f has Statutorily created provisions which restrict the circumstances in which a party may be required to submit to an examination and has clearly delineated that one of the circumstances must be that the examination take place by a licenced physician as defined by Connecticut General Statutes §20-1.

The Workers Compensation Commission by delving into its equitable powers to conduct discovery and hearings and ordering the Petitioner to undergo an examination by a non-physician stepped into the shoes of the Legislature, took upon itself to "balance the considerations of the sanctity of the body and the right to privacy with the considerations of fairness. ." and violated the Petitioner's Right to Privacy as set out in the United States Constitution, the Connecticut Constitution and the Legislative dictates set out in Connecticut Statutory Authority. *Id.*

3. WHETHER OR NOT THE CLAIMANT "OPENED THE DOOR" IS IRRELEVANT, THE STATE OF CONNECTICUT DOES NOT REQUIRE A SHOWING OF GOOD CAUSE TO NECESSITATE SUCH AN EXAMINATION AND DENYING THE RESPONDENT THE RIGHT TO HAVE THE PETITIONER UNDERGO AN EXAMINATION BY A NON-PHYSICIAN IS NOT CONTRARY TO DUE PROCESS.

Connecticut General Statutes Section 31-294f is clear as to its requirements in ordering an examination of a party and does not take into consideration a showing that a party put the issue into controversy or as the Respondents have stated opened the door to the issue nor does it require a showing of good cause. While Federal Rules of Civil Procedure 35 has delineated that the physical and/or mental condition must be in Controversy and there must be a showing of good cause, Connecticut General Statutes 31-294f does not mirror Rule 35 nor did the Courts in this matter look to rule 35 in making its decision.

Even if the courts in this matter had looked to rule 35 in making their determination it is clear that while the issue may be in controversy a showing of good cause for an examination by a vocational rehabilitation specialist would not have been met. Federal Courts have continuously rejected showings of good cause for an examination by a vocational rehabilitation specialist and determined that if a party desires his own vocational expert then the respondents have other discovery procedures available to obtain the same information. See *Acosta v. Tenneco Oil Co.*, 913 F.2d 205 (5th Cir. 1990); *In re Mitchell*, 563 F.2d 143 (5th Cir.1977); *Soudelier v. Tug Nan Services, Inc.*, 116 F.R.D. 429 (E.D.La.

1987); *Acocella v. Montauk Oil Transportation Corp.*, 614 F. Supp. 1437 (S.D.N.Y. 1985).

The Respondents have the same opportunity to obtain more general discovery in Connecticut as under the Federal Rules of Civil Procedure and to submit that information to their own vocational rehabilitation specialist for an opinion and rebuttal testimony at trial. The Respondents argument that this opportunity does not exist and/or is insufficient is again superfluous and should not be used to override the Petitioner's request for review. Lastly, the Workers Compensation Commission did not request that the Respondents show good cause.

4. THE APPELLATE COURT AS THE REVIEWING COURT, UPHELD A RULING WHICH IS A RULING FROM THE BENCH

The respondents contest that the Connecticut Courts surpassed its powers and delved into the powers and stepped into the shoes of the Legislature in ordering a claimant to undergo an examination by a non-physician. Federal and State Courts alike have ruled and determined that an examination not directly authorized cannot be indirectly compelled by more general discovery rules and that doing such is stepping into the role of the Legislature. See *Acosta* supra.

II. THE FEDERAL SOCIAL SECURITY ACT AND THE WORKERS' COMPENSATION ACT OF THE STATE OF CONNECTICUT ARE IN CONFLICT AND THIS ISSUE HAS BEEN PROPERLY PRESERVED

The Petitioner argued before the Workers Compensation Commission and the Connecticut Appellate